

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

JEREMY JOSEPH REYNOLDS,

Plaintiff,

v.

**9:20-CV-686
(TJM/ML)**

T. STONE, et al.,

Defendants.

**Thomas J. McAvoy,
Sr. U.S. District Judge**

DECISION & ORDER

Petitioner filed this action pursuant to 42 U.S.C. § 1983, alleging that Defendants, prison guards and New York State Officials, violated his rights during an incident at Clinton Correctional Facility on June 11, 2019. Plaintiff claims he suffered serious injuries as part of fighting between groups of inmates, and that guards did nothing to protect him though they were aware of the danger he faced. Relevant to the motion here at issue, he also claims that guards used excessive force by shooting tear gas canisters into the incident that struck him in the face and injured him. The Court referred the matter to the Hon. Miroslav Lovric, United States Magistrate Judge, for a Report-Recommendation pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c).

The Report-Recommendation, dated May 24, 2021, recommends that the Court grant Defendants' motion for partial summary judgment and dismiss the Plaintiff's Eighth

Amendment excessive force claims against Defendants McShane, Ormsby, Stone, Provost, and Wood. See dkt. # 38. Judge Lovric finds that Plaintiff did not exhaust his administrative remedies with respect to the excessive force claims. The evidence before Judge Lovric indicated that Plaintiff filed and appealed denial of grievances related to Corrections Officers' failure to act to protect him during the incident, but that he did not file or appeal a grievance related to his claim that officers struck him when they fired into the crowd.

Petitioner filed objections to the Report-Recommendation. See dkt. # 39. When a party objects to a magistrate judge's Report-Recommendation, the Court makes a "*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." See 28 U.S.C. § 636(b)(1). After such a review, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." Id.

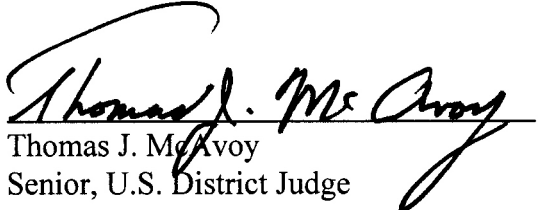
Having reviewed the record *de novo* and having considered the other issues raised in the Petitioner's objections, this Court has determined to accept and adopt the recommendation of Judge Lovric for the reasons stated in the Report-Recommendation. Nothing in the record before Judge Lovric indicated that Plaintiff filed a grievance with respect to the alleged firing into the crowd. The Court notes that Plaintiff included in his objections a document, dated June 21, 2019, that purported to grieve the fact that "[t]he COs in the towers started to shoot gas canisters to the yard. One of this [sic] hit me in the face and knocked out one of my teeth." See dkt. # 39. Unlike every document provided by the parties in this case related to grievances, this paper was not stamped "received,"

and Plaintiff has not produced any evidence to indicate that he appealed a negative response to this supposed filing. The mere existence of this paper, without more, does not provide evidence a jury could use to find exhaustion.

It is therefore **ORDERED** that Plaintiff's objections to the Report-Recommendation of Magistrate Judge Lovirc, dkt. # 39, are hereby **OVERRULED**. The Report-Recommendation, dkt. # 38, is hereby **ACCEPTED** and **ADOPTED**. Defendant's motion for partial summary judgment, dkt. # 21, is hereby **GRANTED**. Plaintiff's Eighth Amendment excessive force claims against Defendants McShane, Ormsby, Stone, Provost, and Wood are hereby **DISMISSED WITH PREJUDICE**. Plaintiff's Eighth Amendment failure to intervene claims against Defendants Bombadier and Ashline are hereby **DISMISSED WITH PREJUDICE**. The Clerk of Court is directed to terminate Defendant Provost from the lawsuit.

IT IS SO ORDERED.

Dated: July 30, 2021


Thomas J. McAvoy
Senior, U.S. District Judge